Filed 3/19/19 P. v. Osuna CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RAUL OSUNA, Defendant and Appellant.	B284737 (Los Angeles County Super. Ct. No. PA085514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Affirmed and remanded with directions.

Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Margare E. Maxwell, Thomas C. Hsieh and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Raul Osuna was convicted following a jury trial of second degree robbery, assault with a deadly weapon and violation of a criminal street gang injunction. The jury also found true an allegation Osuna had used a dangerous weapon, a knife, during the robbery, and Osuna admitted in a bifurcated proceeding two prior felony conviction allegations. On appeal Osuna contends there was insufficient evidence to support his conviction for assault with a deadly weapon and the jury's finding he used a knife during the robbery. Osuna also argues the court erred by failing to instruct the jury on the lesser included offense of simple assault, permitting the prosecutor to engage in an improper line of questioning and wrongly imposing a prior prison term sentence enhancement. Finally, Osuna argues remand for resentencing is necessary to allow the trial court to exercise its discretion under new law, effective January 1, 2019, to strike or dismiss the prior serious felony conviction for sentencing purposes. We affirm the convictions and remand the matter with directions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

On November 16, 2016 Osuna was charged by information with second degree robbery (Pen. Code, § 211),[1] making a criminal threat (§ 422, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)) and violation of a criminal street gang injunction (§ 166, subd. (a)(9)). The information specially alleged Osuna had used a deadly or dangerous weapon, a knife, to commit the robbery and while making the criminal threat (§ 12022, subd. (b)(1)). The information further specially alleged

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[1] Statutory references are to this code unless otherwise stated.

Osuna had served two separate prison terms for felonies within the meaning of section 667.5, subdivision (b), and had suffered a prior serious felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and section 667, subdivision (a).

2. *Evidence at Trial*

In January 2011 Ricardo Herrera was a loss prevention officer for a supermarket chain. He had worked for the company for four years, during which time he had been assigned to various locations on a rotating basis to watch for shoplifters. While on duty Herrera wore plain clothes and attempted to blend in with other shoppers as he monitored the store.

On January 11, 2016 Herrera was on duty at a supermarket in Sylmar. He had been specifically instructed to monitor the liquor display because it had recently been a target for theft. Shortly before noon Herrera saw a man, later identified as Osuna, enter the store and walk toward the liquor display. Osuna took two bottles of whiskey off the shelf and walked to another aisle, at which point Herrera saw Osuna conceal the bottles under his jacket. Osuna then left the store without paying for the liquor.

Herrera followed Osuna into the parking lot. Osuna noticed Herrera following him and started running. Herrera identified himself as a loss prevention officer, but Osuna continued running at a full sprint through the parking lot. Herrera pursued Osuna while continuing to identify himself as a loss prevention officer and directing Osuna to give up the bottles of whiskey. As he ran, Herrera called the supermarket guard on his radio. The guard, who was armed, had not seen Herrera

pursue Osuna out of the store because he had been on his lunch break.

When he arrived at the edge of the parking lot, Osuna stopped running and began walking on the sidewalk. Herrera, winded, also slowed to a walk and continued to tell Osuna, "Drop the bottles, drop the bottles, man. Just get out of here. Give me the merchandise." Osuna did not comply. Herrera then called the 911 emergency operator. Herrera testified that, when Osuna saw him making the call, Osuna yelled, "I'm going to come back. I'm going to get you. I'm going to remember you." Herrera testified Osuna's threat frightened him because he believed Osuna was a gang member. He explained that, based on his four years working for the supermarket chain and having grown up in the area, he understood the San Francisco Giants baseball cap Osuna wore was commonly worn by members of the San Fernando criminal street gang. Herrera added that there had been prior incidents where gang members had come back to the store and confronted him after he had caught a gang member stealing.

According to Herrera, after seeing him on the telephone, Osuna "suddenly stops, places the bottles on the ground and turns around already with a knife in hand [and] said, 'Yeah, yeah, you want some?' and starts charging full speed at me." Osuna held the weapon, a pocket knife, upright in his fist. Herrera testified he was scared and nervous "because he got so close to me, he was catching up to me when he started running with the knife. . . . I knew if I didn't put anything between us . . . that he was going to stab me." Herrera ran behind two parked cars and into the street. Herrera remained on the telephone with the emergency dispatch operator while Osuna

approached him with the knife. He told the operator there was a "suspect with a knife trying to charge at me. . . . Suspect is trying to stab me with a knife."[2]

As Herrera was speaking to the 911 operator, the supermarket guard, Freddy Pineda, caught up to Herrera. Upon seeing the armed guard, Osuna ran back to where he had placed the whiskey bottles and made a telephone call. Moments later, a car pulled up near Osuna and stopped in traffic. Osuna took the whiskey bottles and got in the car, which then drove away. Herrera testified the entire incident lasted approximately five minutes.

Pineda testified that Herrera called him on the radio "screaming that somebody was going after him with a knife." When Pineda arrived, he saw Osuna holding a knife in a threatening manner and chasing Herrera toward the store. Osuna was about six to eight feet behind Herrera. Pineda drew his gun because he was afraid Osuna might kill or harm Herrera. According to Pineda, Herrera appeared to be frightened and his voice was shaking.

Osuna's girlfriend, Viridiana Bautista, testifying during the People's case, said she drove Osuna to the supermarket on January 11 and waited for him in the parking lot while he went inside. A few minutes later he called her and said she needed to pick him up nearby because someone was chasing him. She drove to where he had directed her, and he got in the car. Bautista did not see Osuna with a knife.

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[2] The recording of the 911 call was played for the jury. A surveillance video of the incident was also played for the jury. It showed Osuna in the supermarket and running through the parking lot but not the confrontation with the knife.

Osuna testified in his own defense. He explained he initially went to the market to buy snacks, but decided to take the whiskey bottles instead. He acknowledged it was "not right" to steal the liquor and said he regretted it. As he was leaving the store with the whiskey, he heard someone say, "Hey." He got scared and ran because he did not know who it was and he was carrying stolen merchandise. Osuna claimed he did not hear Herrera identify himself as a loss prevention officer. When he reached the edge of the parking lot, Osuna hid behind a wall and called Bautista to pick him up. Osuna denied speaking to Herrera, having a knife or chasing Herrera. When asked about Herrera's and Pineda's accounts of the events, Osuna responded that they were lying.

On cross-examination Osuna admitted he was a member of the San Fernando criminal street gang and acknowledged having been served with a gang injunction in 2008. He also admitted prior felony convictions for grand theft from a person in 2012 and driving another person's vehicle without consent in 2014.

3. *The Verdict and Sentence*

The jury found Osuna guilty of second degree robbery, assault with a deadly weapon and violating a gang injunction, and found true the allegation Osuna had used a knife during the robbery. The jury was unable to reach a unanimous verdict on the charge of making a criminal threat; that charge was thereafter dismissed on the prosecutor's motion.

Prior to sentencing Osuna admitted the prior felony conviction and prison term allegations. The court sentenced Osuna as a second strike offender to an aggregate state prison term of 20 years: the upper term of five years for robbery, doubled under the three strikes law, plus one year for the weapon

enhancement (§ 12022, subd. (b)(1)), and a consecutive term of one year for assault with a deadly weapon, doubled under the three strikes law, plus five years for a prior serious felony conviction (§ 667, subd. (a)) and one year for each of the two prior felony prison terms (§ 667.5, subd. (b)). The court imposed a concurrent term of six months for violation of the gang injunction.

DISCUSSION

1. *Substantial Evidence Supports the Assault with a Deadly Weapon Conviction and Weapon Enhancement*

a. *Standard of review*

In considering a claim of insufficient evidence in a criminal case, "'we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.

[Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

b. *There was sufficient evidence Osuna committed an assault with a deadly weapon*

The crime of assault with a deadly weapon under section 245, subdivision (a)(1), is an assault—an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another—accomplished with a deadly weapon or instrument other than a firearm. (§§ 240 [defining assault], 245, subd. (a)(1) [assault with deadly weapon]; *People v. Rocha* (1971) 3 Cal.3d 893, 900, fn. 13 [assault with deadly weapon is crime of assault, accomplished with deadly weapon].) A "deadly weapon" for purposes of section 245, subdivision (a)(1), is any object, instrument or weapon, other than a firearm, "'which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

Osuna argues there was no substantial evidence to support the jury's finding he was guilty of assault with a deadly weapon because there was insufficient evidence he actually possessed a knife during his encounter with Herrera. Specifically, Osuna contends Herrera was "hyper sensitive" based on past encounters with gang members and therefore was not a reliable witness. In the alternative Osuna argues, even if he had a knife, he did not have the present ability to cause injury to Herrera because he

was never close enough to him and never pointed or swung the knife at him.

Osuna's arguments misapprehend the deferential standard of review that governs his appeal. It was the jury's exclusive responsibility to evaluate the witnesses' demeanor and credibility. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Furthermore, the "'incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the [trier of fact] in the first instance . . . .'" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.)

Here, Herrera testified Osuna ran at him at full speed while holding a knife upright. Herrera believed Osuna was about to stab him, which he told the emergency dispatch operator. Pineda testified he saw Osuna chasing Herrera while holding a knife in a threatening manner, and Pineda drew his weapon to protect himself and Herrera. Osuna, in contrast, testified he did not have a knife and never ran toward Herrera. The jury evaluated the witnesses' credibility and resolved any conflicts in favor of giving credence to the testimony that Osuna ran at

Herrera while holding a knife.[3] That conclusion was neither a physical impossibility nor an apparently false one.

Moreover, the inference that Osuna was presently able to cause violent injury with the knife while running at Herrera from six feet away was a reasonable one. Herrera testified he was out of shape and already winded, and Osuna ran very fast. Pineda was alarmed enough to draw his weapon. As the Supreme Court has explained, "Although temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (See *People v. Chance* (2008) 44 Cal.4th 1164, 1171, 1172 ["[t]here is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay"].) Accordingly, there was substantial evidence supporting the jury's finding Osuna committed assault even though he never closed

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[3] Osuna argues there was insufficient evidence to support he had a knife because "the evidence at best gave rise to two equal competing scenarios. Hence, neither was established." This misguided assertion is based on language in *People v. Acevedo* (2003) 105 Cal.App.4th 195, which stated that, when facts "give equal support to two competing inferences, neither is established." (*Id.* at p. 198.) However, as our colleagues in the Third District have explained, *Acevedo* "involved speculation and correctly concluded that such speculation did not support the convictions in [that case]. [It] cannot be read to stand for the proposition that a conviction must be reversed when reasonable but conflicting inferences could have been drawn by the trier of fact. Such a standard of review would be contrary to California Supreme Court precedent." (*People v. Massie* (2006) 142 Cal.App.4th 365, 369.)

the distance between him and Herrera and never swung or pointed the knife at him. (See *id.* at p. 1174 ["[i]n [*People v. Yslas* (1865) 27 Cal. 630], the defendant approached within seven or eight feet of the victim with a raised hatchet, but the victim escaped injury by running to the next room and locking the door. Yslas committed assault, even though he never closed the distance between himself and the victim, or swung the hatchet"].)

c. *There was sufficient evidence Osuna personally used a knife during the robbery*

Section 12022, subdivision (b)(1), provides: "A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year . . . ." Osuna again argues there was insufficient evidence to support the jury's finding he had a knife during his confrontation with Herrera. This argument fails for the reasons discussed.

2. *The Trial Court Had No Sua Sponte Obligation To Instruct the Jury on Simple Assault*

The trial court has a duty to instruct the jury sua sponte on all lesser included offenses if there is substantial evidence from which a jury could reasonably conclude the defendant committed the lesser uncharged offense, but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68; *People v. Rogers* (2006) 39 Cal.4th 826, 866-867; *People v. Breverman* (1998) 19 Cal.4th 142, 155.) This requirement "'prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is

neither "harsher [n]or more lenient than the evidence merits.'"" (*People v. Smith* (2013) 57 Cal.4th 232, 239-240; accord, *People v. Banks* (2014) 59 Cal.4th 1113, 1160; *People v. Campbell* (2015) 233 Cal.App.4th 148, 162.)

"'[T]he existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense . . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense." (*People v. DePriest* (2007) 42 Cal.4th 1, 50; accord, *People v. Whalen, supra,* 56 Cal.4th at p. 68.) Substantial evidence is defined for this purpose as "evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) Further, "[i]n deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*Id.* at p. 162.)

We review the trial court's failure to instruct on a lesser included offense de novo (see *People v. Licas* (2007) 41 Cal.4th 362, 367; *People v. Manriquez* (2005) 37 Cal.4th 547, 581), considering the evidence in the light most favorable to the defendant (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137).

Osuna asserts the court had a sua sponte duty to instruct the jury on simple assault as a lesser included offense of assault with a deadly weapon. (See *People v. McDaniel* (2008)

159 Cal.App.4th 736, 747-748 ["simple assault (§ 240) is a lesser included offense of aggravated assault (§ 245, subd. (a)(1))"].) Specifically, he argues the jury could have concluded he did not have a knife when he charged at Herrera or that he only brandished the knife but did not use it in a threatening manner. Contrary to Osuna's assertions, there was no substantial evidence from which the jury could find him guilty only of simple assault. The jury was presented with two competing factual scenarios—either Osuna ran toward Herrera with the knife in a threatening manner, as Herrera and Pineda testified, or he never had a knife and never confronted Herrera in any way (that is, committed no assault at all), as Osuna testified. The jury could either believe the first account or the second. There was no basis on which the jury could conclude a third scenario occurred—one in which Osuna ran toward Herrera without a weapon. (See *People v. Vargas* (2001) 91 Cal.App.4th 506, 548-549 [evidence showed that defendant was either guilty of first degree, premeditated murder or not guilty of any crime; there was no middle ground that supported second degree murder lesser include offense instruction]; see also *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [imperfect self-defense instruction not required where victim either attacked defendant with a knife or no such attack occurred].) Accordingly, there was no evidence to support an instruction on simple assault.

3. *The Trial Court Did Not Commit Prejudicial Error in Admitting Testimony Regarding Osuna's Daughter*

During cross-examination the prosecutor asked Osuna whether his daughter was in the car with Bautista when she dropped him off at the supermarket. Osuna replied she was. When the prosecutor asked how old his daughter was at the time,

defense counsel objected on relevance grounds. The objection was overruled, and Osuna answered his daughter was 11 months old in 2016. The prosecutor then asked, "Did you think about the fact she was in the back of your car when you went into the [supermarket] and decided to steal some liquor from the store?" Defense counsel again objected on relevance grounds, and the objection was overruled. Osuna answered, "To be honest with you, it didn't cross my mind."

Osuna argues the court should have excluded this testimony under Evidence Code section 352, which authorizes a court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues or misleading the jury. Undue prejudice in this context means "'evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 133; accord, *People v. Crew* (2003) 31 Cal.4th 822, 842.) The trial court has broad discretion to admit or exclude evidence under Evidence Code section 352, and its ruling will not be disturbed absent evidence that it is arbitrary or capricious. (See *People v. Williams* (2008) 43 Cal.4th 584, 634; *People v. Mills* (2010) 48 Cal.4th 158, 195.)

Osuna forfeited any abuse-of-discretion claim under Evidence Code section 352 by failing to object on this ground in the trial court. (Evid. Code, § 353, subd. (a); see *People v. Abel* (2012) 53 Cal.4th 891, 924 ["'[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct'"].) His objection the testimony was not relevant is insufficient to preserve this issue for appeal. (*People v. Bryant,*

Smith and Wheeler (2014) 60 Cal.4th 335, 412-413.) In any event, even if we were to agree with Osuna that the minimal relevance of this testimony to his state of mind and credibility was outweighed by the prejudice created by the negative portrait it painted of him as a father, any error in admitting the evidence was harmless. In light of Herrera's and Pineda's testimony and the audio tape of the 911 call, there is no reasonable probability the jury would have returned a verdict more favorable to Osuna if the court had sustained the objections to these questions. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 76 [appellant bears the burden of demonstrating erroneous admission of evidence was prejudicial under the standard established by *People v. Watson* (1956) 46 Cal.2d 818, 836].)

4. *The Prosecutor Did Not Commit Prejudicial Misconduct*

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

Osuna contends the questions regarding his daughter on cross-examination constituted prosecutorial misconduct. (See *People v. Smithey* (1999) 20 Cal.4th 936, 960 [improper for prosecutor to intentionally attempt to introduce inadmissible

evidence]; accord, *People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) However, even if Osuna had not forfeited his prosecutorial misconduct argument by not raising it in the trial court (see *People v. Samayoa* (1997) 15 Cal.4th 795, 841), as discussed, eliciting such testimony did not make the trial fundamentally unfair, nor did it create any substantial risk of improper prejudice to Osuna. (Cf. *Chatman*, at pp. 379-380 ["'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct. . . .' [Citation.] Although the prosecutor in this case certainly asked the questions intentionally, nothing in the record suggests he sought to present evidence he knew was inadmissible, especially given that the court overruled defendant's objections"].)

5. *One of the Sentence Enhancements Imposed Pursuant to Section 667.5, Subdivision (b), Should Have Been Stayed*

In sentencing Osuna the trial court improperly imposed both a five-year enhancement pursuant to section 667, subdivision (a)(1), and a one-year enhancement pursuant to section 667.5, subdivision (b), based on Osuna's 2012 conviction for grand theft committed for the benefit of a criminal street gang. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 [enhancements under both sections 667, subdivision (a)(1), and 667.5, subdivision (b), cannot be applied to the same prior offense; "when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply"].) Because it imposed the five-year enhancement under section 667, subdivision (a), the court should have imposed and then stayed execution of the additional one-year term. (Cal.

Rules of Court, rule 4.447; see *People v. Brewer* (2014) 225 Cal.App.4th 98, 104-105; *People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9; *People v. Lopez* (2004) 119 Cal.App.4th 355, 364.)

6. *A Limited Remand Is Appropriate for the Trial Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancement*

At the time Osuna was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements "in the furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1 & 2.)

Osuna and the Attorney General agree, as do we, that the new legislation applies retroactively to Osuna and other defendants whose sentences were not final before January 1, 2019. (See *People v. Garcia*, *supra,* 28 Cal.App.5th at p. 973 ["it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019"]; accord, *People v. Johnson* (2019) 32 Cal.App.5th 26, 68; see generally *In re Estrada* (1965) 63 Cal.2d 740, 745.) However, the parties disagree on whether remand is appropriate.

The Attorney General argues remand is not warranted in this case because "the trial court's statements at sentencing clearly indicated that it would not have dismissed the

enhancement[] in any event," citing *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, and *People v. Chavez* (2018) 22 Cal.App.5th 663, 713, and pointing to the trial court's imposition of the upper term for robbery, its denial of Osuna's request to dismiss his prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and its emphasis on the fact that the strike prior had included a gang enhancement and in the instant case the jury found that Osuna had violated a gang injunction, as well as Osuna's on-parole status at the time of his conviction.

Although the Attorney General is correct that the trial court did not demonstrate leniency in the sentencing decisions it made, we cannot conclusively determine from the record that remand would be a futile act. (See *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3 [remanding for resentencing when "the record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant"]; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [defendants are entitled to sentencing decisions made in the exercise of the informed discretion of the sentencing court]; *People v. McDaniels*, *supra*, 22 Cal.App.5th at pp. 427-428 ["no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements" as to which new discretion to strike had been enacted].) Simply put, the decision to impose the upper term for a substantive offense or to deny a request to dismiss a strike prior does not necessarily involve the same weighing of factors as the determination whether to impose an additional five-year status enhancement on an already lengthy state prison term.

DISPOSITION

Osuna's convictions are affirmed, and the matter remanded for the trial court to consider whether to strike the prior serious felony enhancement under section 667, subdivision (a). If the court elects not to strike or dismiss that enhancement, Osuna's sentence must be modified to reflect a stay of execution of the one-year sentence enhancement pursuant to section 667.5, subdivision (b), with a corrected abstract of judgment prepared and forwarded to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.